90-1210

(1)

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1990

CHESTER UPLAND SCHOOL DISTRICT,

Petitioner,

vs.

LESTER H., a Minor, and OCTAVIA P., his mother and next friend,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a school district shares the Eleventh Amendment immunity enjoyed by the state under *Dellmuth v. Muth* where the school district acts as an arm of the state, and under the pervasive regulations of the state as part of the state's primary responsibility for compliance with the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*

2. Whether compensatory education beyond age 21, the maximum age applicability under the Education of the Handicapped Act and *Honig v. Doe* is an available legal remedy for any delay in placement, especially where the justiciable nature of such need is speculative for a 12-year old student and where the claim for compensatory education has not been pursued through available administrative remedies.

3. Whether the award of compensatory education by the district court in this case, if available under the Education of the Handicapped Act, was an abuse of discretion by such court under the circumstances herein and reviewed by the Circuit Court of Appeals under the appropriate standard or scope of review.

PARTIES

In addition to Petitioner Chester Upland School District and Respondents Lester H. and Octavia P. the captioned parties, the Secretary of Education of the Commonwealth of Pennsylvania was also a party below. The Secretary did not participate in the Court of Appeals. During the pendency of the proceedings in the District Court, the Secretary of Education was Thomas K. Gilhool. The Secretary of Education of the Commonwealth of Pennsylvania is now Donald M. Carroll, Jr.

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No.

In The

Supreme Court of the United States

October Term, 1990

CHESTER UPLAND SCHOOL DISTRICT,

Petitioners,

vs.

LESTER H., a Minor, and OCTAVIA P., his mother and next friend,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTORY STATEMENT

Fronefield and deFuria, by Leo A. Hackett, Esquire, on behalf of the Chester Upland School District, Petitioner, hereby petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 916 F.2d 865 (3d Cir. 1990), *sub nom. Lester H., et al. v. Gilhool, et al.* The decision of the District Court is not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated September 27, 1990. A petition for rehearing was denied on October 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Education of the Handicapped Act provides, *inter alia*:

1. "In order to qualify for assistance . . . in any fiscal year, a State shall demonstrate that . . . a free appropriate public education will be available for all handicapped children between the ages of three and . . . twenty-one . . . ." 20 U.S.C. § 1412(2)(B).

2. "The State educational agency shall be responsible for assuring that the requirements of this [Act] are carried out . . ." 20 U.S.C. § 1412(6).

3. "Any party aggrieved by the findings and decision made [in the state administrative proceedings] shall have the right to bring a civil action . . . in any State Court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance

of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

4. "The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that state." 20 U.S.C. § 1401(a)(22).

The Public School Code of Pennsylvania, 24 Purdon's Statutes § 13-1376(a) provides:

> "When any child between school entry age and twenty-one . . . is enrolled, with the approval of the Department of Education, in an approved private school . . . approved by the Department of Education, in accordance with standards and regulations promulgated by the State Board of Education, the school district in such child is resident shall pay the greater of either twenty per centum (20%) of the actual audited cost of tuition and maintenance of such child in such school, as determined by the Department of Education, or its 'tuition charge per . . . pupil', and the Commonwealth shall pay . . . the balance due . . . ."

STATEMENT OF THE CASE

This case was commenced as an action by a child and his mother under the Education of the Handicapped Act, 20 U.S.C. § 1400, et seq. ("EHA"). The Complaint claimed that Act as its jurisdictional basis, as well as federal question jurisdiction and

jurisdiction under 28 U.S.C. § 1343 (civil rights cases). Although the Complaint referred to the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Rehabilitation Act was not claimed as a jurisdictional basis in the Complaint. The Complaint was not an appeal from an administrative agency decision within the meaning of the jurisdictional grant of the Education of the Handicapped Act [20 U.S.C. § 1415(e)] but rather an initial action commenced without prior administrative proceedings. There was no finding by the lower court raising any civil rights ramifications.

The minor child Lester H. (born November 24, 1978) is mentally retarded. The child is now twelve years old. During the 1983-84 school year, when the boy was five or six years old, Petitioner Chester Upland School District (the "District") determined that the boy's handicaps were such that the District could not provide an educational program for him in a District school and he was placed with his mother's consent at the Summit School, an educational program operated by the local (Delaware County, Pennsylvania) Intermediate Unit of the Commonwealth of Pennsylvania (the "I.U.").[1] During the 1983-84 school year, Lester progressed and was showing signs of adjusting to the program at Summit School. The District noted the improvement and felt that the Summit School program was appropriate for the child.

During the 1984-85 school year, however, Lester began having problems in the Summit program. These problems were reported

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1. "The Commonwealth of Pennsylvania is divided into twenty-nine regions called intermediate units under the Public School Code [of Pennsylvania]. The intermediate units were established . . . to provide on a regional basis certain educational services to school districts assigned to each intermediate unit." *Com. ex. rel. Waychoff v. Tekavec*, 456 Pa. 521, 522-23, 319 A.2d 1 (1974). The I.U. is an "intermediate educational unit" under the "general supervision of a state educational agency" as the term is defined in the EHA at 20 U.S.C. § 1401(a)(22). The I.U. was not named by Respondents as a party herein.

to the District by Summit School personnel, and a number of conferences were held to address the situation. A number of modifications were proposed and made to the program in order to accommodate the problems that Lester was having. At one point, for instance, a full-time aide was added to assist with Lester, but over time and despite the adjustments, Lester had continued problems in the program. By mid to late October of 1984, the District concluded that the Summit program should be replaced with a new placement.

At that time, the District contacted and thereafter remained in periodic contact with the Pennsylvania Department of Education ("Department"), as well as the I.U. concerning Lester. The District was also in periodic contact with and solicited the assistance of the Mental Health and Mental Retardation Center of Delaware County, Pennsylvania as well as other similar agencies. The District solicited suggestions from the I.U., the Department and such agencies for alternative educational placements for the child, and they did suggest places that the District could try in attempting to find a placement. In each case, however, the suggestions did not result in a placement. The schools suggested simply rejected placement of Lester although nearly each one would have been an appropriate placement.

Also during the 1984-85 school year the District was in contact with various schools and programs, seeking to find a program which would be appropriate for Lester. While it was felt that a residential program would be the most appropriate, the District inquired into both residential and day programs in the hope of finding an appropriate program which would benefit Lester and comply with the EHA applicable law mandating the "least restrictive placement".

On August 8, 1985, Lester was disenrolled by the I.U. from the I.U.-operated program at the Summit School. While the

District's search for an appropriate program for Lester continued, Lester was placed on instruction in the home provided by the I.U. which continued over the 1985-86 school year. The child's mother consented in writing to the home instruction on a Notice of Recommended Assignment ("NORA"). During this time, the District continued to inquire into various programs, maintained contact with the I.U., the Department and other agencies, and submitted formal applications for admission on Lester's behalf whenever it appeared that a program might be suitable for the child. Unfortunately, Lester was not accepted into any program.

In April, 1986, at the recommendation of the Department, the District applied for a second time to The Elwyn Institute, which agreed to and did accept Lester as a day student for its supplemental summer school program. The District was hopeful that following the summer program, Elwyn would agree to accept Lester into its full time program, but Lester was rejected by Elwyn for the requested placement as a full time residential student. In September, 1986, following Elwyn's summer program, Lester was placed on instruction in the home, again with his mother's consent.

Through the Fall of 1986, the District continued inquiries and a number of applications to facilities in Pennsylvania on behalf of Lester. None agreed to accept him. The instruction in the home provided by the I.U. continued. On October 14, 1986, the same day as the Department advised the District of an opportunity for placing Lester at the Au Clair School in Bear, Delaware, the District made an application. The District's search had theretofore not focused on out-of-state schools since Pennsylvania Department of Education regulations require exhaustion of resort to in-state schools prior to an out-of-state placement. In December, 1986, Au Clair agreed to accept Lester and on January 21, 1987, Lester began attending Au Clair School. The child has attended Au Clair as a residential student for the four years since. The cost is approximately $87,000 per year.

Prior to approximately August of 1985, Au Clair did not serve children such as Lester. Indeed, notices of this expansion in Au Clair's programs to accommodate children such as Lester were not sent to the Pennsylvania Department of Education as there were apparently no Pennsylvania students placed there as of that time.

Plaintiffs' Complaint filed by Lester and his mother sought injunctive relief enjoining named Defendants Chester Upland School District and the Secretary of the Pennsylvania Department of Education to: (1) place the child in a residential special education program; and (2) provide the child with a residential special education program through age 21 and beyond. Basically, the Complaint claimed that, because the child reported to Au Clair two and one-half years after he was disenrolled by the Intermediate Unit from an I.U. school, he was entitled to two and one-half additional years at such a program as "compensatory education" after his reaching the age of 21. Shortly after the Complaint was filed, the child was placed by Stipulation among all parties in the appropriate program at the Au Clair School in Bear, Delaware in January, 1987 and attended school there for over a year before the case came to trial in the District Court. Prior to trial, the Plaintiff's request for an injunction directing placement of the child in a program was denied as moot due to the previous placement at the Au Clair School.

While a decision from the district court following trial was pending, this Court on June 15, 1989 announced its decision in *Dellmuth v. Muth*, 491 U.S.____, 109 S. Ct. 2397, 105 L.Ed. 2d 181 (1989) and the parties briefed and argued the impact of that decision to the lower court.

On November 9, 1989, the district court entered a declaratory judgment providing in relevant part as follows:

> "Lester H. is entitled to a free appropriate education for 2-1/2 years beyond the age of 21; the form and manner of his education is subject to annual determination in accordance with the procedures under the Education of the Handicapped Act . . ."

The Third Circuit Court of Appeals affirmed. There was no finding in either court of any civil rights violations nor that there were any other constitutional ramifications. The Rehabilitation Act was cited only by the lower court and only as an alternate basis for part of that court's ruling.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that "compensatory education" extending beyond the age of 21 is unavailable under the Education of the Handicapped Act and such an award is precluded by the Eleventh Amendment. The result of the district court enjoining the Petitioner and the Department of Education to provide such education is that despite the efforts of a school district to refer a child with State Department of Education assistance to a residential program, a money judgment or liability has been imposed upon the State and the school district. Such an order, which remains the subject of a split among the circuits, is contrary to the Eleventh Amendment immunity recognized by this Court in *Dellmuth v. Muth*, 491 U.S. ____, 109 S. Ct. 2397, 105 L.Ed. 2d 181 (1989) and extends such education beyond the age limitations of the EHA recognized by this Court in *Honig v. Doe* 484 U.S. 305 (1988). Further, in establishing an order for such "compensation" to commence at age 21 the doctrine of ripeness is violated.

Sovereign immunity under the Eleventh Amendment to the United States Constitution was held by this Court in *Dellmuth*

v. Muth, to be unaffected by the Education of the Handicapped Act. In *Dellmuth,* this Court settled the conflict among the circuit courts which had addressed the issue. Under *Dellmuth,* whatever may have previously been available in the nature of tuition reimbursement [e.g. *Burlington School Committee v. Massachusetts Dept. of Education,* 471 U.S. 359 (1987)] is no longer a remedy available against a state in a federal court.

A school district should be deemed to share in this immunity under *Dellmuth.* Under the rule of *Ford Motor Company v. Department of Treasury of Indiana,* 323 U.S. 459 (1945) the test for determining whether sovereign immunity under the Eleventh Amendment reaches beyond the state itself is whether the state is in effect the "real, substantial party in interest" in the case in that the "essential nature and effect of the proceedings" is "for recovery of money from the state." Secondly, significant state control over the education of special education students in accordance with Congress' Mandate in the EHA places school districts nationwide in a position as "alter ego" or "arm" of the state expanding immunity to the district. *See also Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984).

By virtue of the School Code of Pennsylvania, Act of March 10, 1949, P.L. 30, § 1376, as amended (24 Purdon's Statutes § 13-1376), the cost of educating Pennsylvania special education students at private schools is funded 80% by the State and 20% by the local school districts. Thus, the cost of educating Lester is, indeed, from the state coffers. The state is financially the real party in interest here, as elsewhere nationwide.

In addition to financial arrangements, the states, in accordance with the EHA, pervasively regulate school districts' special education programs in discharging the responsibility imposed primarily upon the States by Congress in the EHA. It is uniformly held that the EHA imposes upon the states the

primary responsibility for assuring compliance with the Act in special education programs: *See, e.g., Max M. v. Thompson,* 592 F.Supp. 1450 (N.D. Ill. 1984); *Tatro v. Texas,* 703 F.2d 823 (5th Cir. 1983), *aff'd in part and reversed in part,* 468 U.S. 883 (1984). *Cf. Smith v. Robinson,* 468 U.S. 992 (1984). The state wields this responsibility through such pervasive regulation of school district special education programs. Thus, as to special education students in particular, the local school districts act essentially as an arm or as the "alter ego" of the state, and should therefore partake of the same sovereign immunity as the state enjoys since *Dellmuth v. Muth.* Where, as in special education, the School District is exercising at the direction of the State a "slice of a state power", or, perhaps more accurately, discharging an obligation of the State under the State's close supervision and pervasive regulation, the same Eleventh Amendment immunity should attach to the District.

Because the school district involved in *Dellmuth v. Muth* did not participate in the proceedings on certiorari to this Court, the Court did not have occasion therein to reach this question. It is respectfully submitted, however, that the lower court's refusal to acknowledge the scope of this Court's decision in *Dellmuth* improperly leaves immunity at the state level of responsibility under the EHA for compliance yet denies immunity at the local level of school districts laboring under the direction of and pervasive regulation by the immune states. The effect is to impose on the school district the full liability and responsibility for which both parties where found responsible and despite the state law imposing 80% of the responsibility on the State. Should a local school district, left without immunity, attempt to compel a state to comply with the EHA, the Eleventh Circuit has held that the courts will recognize no EHA cause of action. *See Andrews v. Ledbetter,* 880 F.2d 1287 (11th Cir. 1989).

The EHA expressly limits its applicability to children through

age 21. The inapplicability of the EHA beyond age 21 was expressly noted and recognized by this Court in *Honig v. Doe,* 484 U.S. 305 (1988) in denying, as moot, a petitioner's challenge under the EHA to disciplinary action once that petitioner had reached age 24. The decision in *Honig* in effect denied to a student a remedy after age 21 for a violation of the EHA that occurred before age 21. Compensatory education beyond age 21 should be just as unavailable. The Third Circuit's decision on this point is in conflict with the decisions of two state courts of last resort, specifically denying compensatory education beyond age 21: *See Adams Central School District v. Deist,* 214 Neb. 307, 334 N.W. 2d 775 (1983); *Natrona County School District No. 1 v. McKnight,* 764 P.2d 1039 (Wyo. 1988). *Cf. Stewart v. Salem School District,* 65 Or. App. 188, 670 P.2d 1048 (1983) (no EHA right *below* minimum age of Act).

Of the cases addressing the issue of availability of compensatory education as a remedy under the EHA, the decisions have been split. The decisions authorizing compensatory education include *Burr v. Ambach,* 863 F.2d 1071 (2d Cir 1988);[2] *Jefferson County Board of Education v. Breen,* 853 F.2d 853 (11th Cir. 1988); and *Miener v. Missouri,* 800 F.2d 749 (8th Cir. 1986). Each of the decisions simply states that such a remedy should be available, reasoning by analogy to tuition reimbursement under *Burlington* (discredited by *Dellmuth's* Eleventh Amendment ruling), in that the now-discredited remedy of reimbursement would be limited to parents able to "front" the cost of a private school placement. Nor is it reasonable to suggest that absent compensatory education, the right to an appropriate education would be "illusory": The EHA and regulations provide painstaking administrative remedies and procedures to those

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2. Subsequently in *Mrs. C. v. Wheaton,* 916 F.2d 69, 76 (2d Cir. 1990) the Second Circuit indicated some question as to whether compensatory education under the EHA remains available after *Dellmuth.*

claimants whom, unlike the Respondents herein, opt to pursue them. Under the EHA, the administrative goal is to obtain an appropriate placement in accordance with the Act. Recourse to the courts is established to allow an appeal to one who has first resorted to those administrative processes yet desires an appeal. None of the other circuit courts approving compensatory education had occasion to respond to *Honig v. Doe* and this Court's recognition of the limited age scope of the EHA. On the other hand, the same Eighth Circuit in *Miener v. Missouri,* 673 F.2d 969 (8th Cir. 1982) and the Ninth Circuit in *Alexopulos v. Riles,* 784 F.2d 1408 (9th Cir. 1986) denied compensatory education as an available form of relief.

The lower courts appropriately found no civil rights implications in this case. As such, the "prospective relief" exception referred to by citation to *Milliken v. Bradley,* 433 U.S. 267 (1977) is not invoked in the absence of constitutional ramifications. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984). Compensatory education was granted by those courts allowing it as analogous to a right to tuition reimbursement, now unavailable against the State under the Eleventh Amendment after *Dellmuth.* Compensatory education effectively directing the state and school district to pay private school tuition is not for Eleventh Amendment purposes "solely prospective" with such a direct and obvious effect on the state treasury; compliance with the lower court's declaration in this case is not a directive to educate the child in the existing school system beyond age 21 but rather to pay for his education, at state expense, at the private school. As such, there is thereby created effectively a form of education malpractice, a theory of relief which no court applying the EHA has ventured to recognize. Indeed, in an absence of a showing of a relationship between time of alleged deprivation and the effect of such period of time, such a theory is more akin to strict liability.

Article III of the United States Constitution, and the decisions of this Court thereunder, limit the jurisdiction of the federal courts to cases wherein there is an ongoing controversy: *Steffel v. Thompson,* 415 U.S. 452 (1974); *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); *Preiser v. Newkirk,* 422 U.S. 395 (1975). It is respectfully submitted that where, as here, a child is in an appropriate placement even prior to trial in a district court, there is no longer any existing controversy by the time of trial. An appropriate placement, the goal of the EHA, is provided. Indeed, here, Respondents' request for an injunction directing placement was denied by the lower court as moot after Lester reported to Au Clair in the beginning of 1987. Since that time, whatever controversy may arise concerning the further need for education cannot be dictated at age 12 but must be assessed as the student grows and develops. To provide two and one-half years of education beyond age 21 when it is not known if the student will reach his full potential before then, despite any delay in placement, is either the decision of an issue not ripe for adjudication on the imposition of a penalty not authorized by the EHA.

CONCLUSION

The EHA is designed to assure an appropriate educational placement by allowing a parent or guardian aggrieved with a child's placement or suggested change in placement to institute state-run administrative proceedings, with appellate recourse therefrom to the courts. Congress and the courts mandate that the State bears the responsibility for these assurances. In Pennsylvania, as elsewhere nationwide, financial arrangements for private school tuitions split the cost between a state and a school district. What this Court has required under the EHA is a program providing a "basic floor or opportunity" permitting a child to benefit educationally. *Board of Education v. Rowley,* 458 U.S. 176 (1982).

At the same time, the EHA involves a need to "balance the important needs of the individual handicapped child and the realities of limited public monies." *Doe v. Anrig,* 692 F.2d 800 (1st Cir. 1982). Accord: *Department of Education v. Katherine D.,* 727 F.2d 809 (9th Cir. 1983).

In this case, Lester was disenrolled by an "intermediate educational unit" from a school program administered by it rather than by the Petitioner Chester Upland School District and during the search for a private school willing to accept Lester, the I.U. tutored the boy in his home. The District applied to schools that simply rejected Lester, limiting its search to in-state schools as required by the State and, once an out-of-State placement was suggested by the State and authorized by the State, the District immediately applied there. The boy was accepted and has been there since.

Dellmuth affords an immunity to the state which, under the EHA, is responsible for carrying out the Act's mandates and with which, under expense arrangements in Pennsylvania and elsewhere, the bulk of the payment for private schools tuitions rests. However,

because the school district in *Dellmuth* did not participate in this Court therein, the Court had no occasion to determine whether the school district "arms" of the state should share in the immunity. At the same time, guidance provided by this Court in *Honig v. Doe* on the age limits of the EHA was not followed by the courts below, creating a split on the issue with at least two state courts of last resort.

For all of the foregoing reasons, it is respectfully submitted that the Petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner Chester Upland School District

APPENDIX A — SUR PETITION FOR REHEARING DATED OCTOBER 24, 1990 TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-2046

LESTER H., a minor, who sues by his mother and next friend, OCTAVIA P., and OCTAVIA P. on her own behalf,

v.

THOMAS K. GILHOOL, Secretary of Education, Commonwealth of Pennsylvania and THE CHESTER UPLAND SCHOOL DISTRICT,

CHESTER UPLAND SCHOOL DISTRICT,

Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 86-6852)

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, AND ALITO, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned

Appendix A

matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/ R. Mansmann
Circuit Judge

Dated: October 24, 1990

APPENDIX B — OPINION FILED SEPTEMBER 27, 1990 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed September 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-2046

LESTER H., a minor, who sues
by his mother and next friend,
OCTAVIA P., and OCTAVIA P.,
on her own behalf

V.

THOMAS K. GILHOOL, Secretary of Education,
Commonwealth of Pennsylvania and THE
CHESTER UPLAND SCHOOL DISTRICT

CHESTER UPLAND SCHOOL DISTRICT,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action No. 86-6852)

Argued July 12, 1990

Before: BECKER, HUTCHINSON, and NYGAARD,
Circuit Judges

(Opinion Filed September 27, 1990)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*

In this declaratory judgment action brought pursuant to the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401-1415, *as amended*, Education for All Handicapped Children Act of 1975, Pub.L. No. 94-142, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), the district court awarded the plaintiff, Lester H., two and one half years of compensatory education beyond age 21, the statutory maximum specified in the EHA. App. at 31; 20 U.S.C. § 1412(2)(B). The Chester Upland School District ("School District") appealed.[1] We will affirm.

I.

The plaintiff, Lester H., is a profoundly retarded twelve-year-old with severe behavioral problems.

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1. The Secretary of Education for the Commonwealth of Pennsylvania did not appeal.

Lester began his education within the School District in the fall of 1983. But even before Lester entered school, the District Director of Special Education determined that the School District could not provide an appropriate special education program for him. Parties' Stipulations ("Stipulations") at ¶13, app. at 37. The School District, Lester's mother and the Delaware County Intermediate Unit ("IU") agreed that Lester should be placed at the Summit School, a special education day-facility, for that academic year. Stipulations at ¶14, app. at 37. Octavia P., Lester's mother, signed a Notice of Recommended Assignment ("NORA") consenting to the Summit School placement. He remained at Summit throughout the year and progressed with his Individualized Education Program ("IEP"). Stipulations at ¶17, app. at 38.

The next fall, Lester's behavior deteriorated significantly. In October 1984, the Director, Summit officials and Lester's teacher concluded that Summit could no longer provide an appropriate education for Lester and they recommended that he be placed in a residential program. Stipulations at ¶¶21, 28-9, app. at 39, 41-42. Nevertheless, Lester remained at Summit during the 1984-85 school year because the School District limited its efforts to place him to only one approved school, the Elwyn Institute, and one unapproved school, the Don Guanella School. Both schools rejected him. Stipulations at ¶¶38, 40, app. at 43-44. Lester was finally removed from Summit in August, 1985. Lester's mother signed a NORA consenting to in-home instruction while her child awaited appropriate residential placement. Stipulations at ¶¶48, 51, app. at 45. The School District then developed an in-home IEP for the 1985-86 academic year which provided Lester with

only five hours of instruction per week. This IEP began on November 11, 1985 and, with revisions, continued until late June, 1986. Stipulations at ¶54, app. at 46; ¶64, app. at 47.

For the majority of Lester's home-bound instruction period, the School District did not request residential placement for him. In April, 1986, the School District applied to the Devereux Foundation and the Wordsworth Academy. Both schools rejected Lester. Finally, after prodding by Lester's counsel and the Pennsylvania Department of Education ("DoE"), the School District re-applied to Elwyn. Lester was admitted to Elwyn's Extended School Year day program in June, 1986 and his mother signed a NORA consenting to this placement. Stipulations at ¶¶59-64, app. at 47. He lasted only 34 days at Elwyn and was returned to in-home instruction. Stipulations at ¶67, app. at 48.

During August and September, 1986, the School District applied to four schools. All four schools rejected Lester. Stipulations at ¶¶69-72, app. at 48-49. Lester's counsel then petitioned the Chief of the Bureau of Special Education of the DoE requesting that he assist in locating an appropriate special education program for Lester. Stipulations at ¶73, app. at 49. In response DoE required the School District to provide it with a status report and suggested that the Director apply to the AuClair School, an out-of-state facility located in Bear, Delaware. Stipulations at ¶¶75-6, app. at 50.[2] Lester was admitted and has attended AuClair since January 21, 1987, and is making slow but satisfactory progress.

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2. The Director applied to no out-of-state schools before AuClair. Stipulations at ¶77, app. at 50.

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The EHA requires the School District to provide an appropriate education for Lester until he reaches age 21. The foundation of this case is that, for 2 1/2 years, the School District failed to do so. *See generally* 20 U.S.C. § 1412; App. at 29. Before the School District placed Lester at AuClair, Octavia P., on behalf of her son, filed this declaratory judgment action against the Commonwealth of Pennsylvania, Secretary of Education and the School District, seeking a declaration that Lester's right to a free appropriate education had been compromised and that he was entitled to appropriate education services for 2-1/2 years beyond age 21 as compensation "for the period during which he was denied appropriate services." App. at 15.

Lester moved for a preliminary injunction requiring that he be immediately placed in a residential special education program. The motion was denied as moot when AuClair admitted Lester.[3] App. at 2. The district court held a trial on the remaining issue in the spring of 1988 and entered a declaratory judgment order on November 9, 1989, awarding Lester 2 1/2 years of compensatory education to extend beyond age 21. App. at 6. On appeal, the School District claims that: (1) this case is not ripe for judicial relief; (2) Lester failed to exhaust administrative remedies provided him by the EHA; (3) eleventh amendment sovereign immunity bars Lester's action against the School District; and (4) compensatory education is not an available EHA remedy.

II.

The district court held that "[t]his case is ripe and otherwise justiciable." App. at 30. Our review

3. That order is not at issue in this appeal.

of the ripeness decision is plenary. *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 n.8 (3d Cir. 1988). "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Devel. Comm'n*, 461 U.S. 190, 201, 103 S. Ct. 1713, 1720 (1983) (*quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 580 (1977)); *see also Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

The School District argues that a compensatory remedy requires the court to ascertain Lester's future educational needs and these needs are not ripe for decision. This is simply not true. The injury has been done and although the exact contours of the appropriate remedy may not be ascertainable now, Lester's injury certainly could be, and was, ascertained. Moreover, the court left ample room for the exact contours of the remedy to be shaped by the appropriate authorities at the appropriate time. All the court did was award Lester the number of years needed to restore that which concededly had been denied him and that to which he is entitled under 20 U.S.C. § 1412(2)(B).

The School District contends that the court is predicting Lester's future educational needs by awarding him 30 months of compensatory education beyond age 21. We agree that courts may not engage in speculation. *See DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5, 94 S. Ct. 1704, 1707 n.5 (1974) (*per curiam*) (citations omitted). But here the district court did not speculate. It conceded that it was unable to predict Lester's future educational needs, and wisely left the "form

or components of the instructional program" to be determined, once Lester reaches age 21, by the collective effort of school officials, parents and professionals as required by the EHA.[4] The district court granted Lester a compensatory remedy totalling 30 months to offset "that period of deprivation of [Lester's] entitlement before the age of 21." App. at 31. We conclude that these issues are fit for determination.

Second, a decision at this time poses no hardship for the School District. Indeed, it gives them additional time to prepare for Lester's compensatory education. Conversely, it would pose a hardship to Lester and Octavia if they are required to wait. School District officials involved in Lester's placement or misplacement are available to answer for their actions or inaction. Experts who examined Lester are available to testify with events fresh in their minds. In short, now is the most convenient time for all parties to present evidence as to whether Lester received an appropriate placement, whether one was available, and the extent of the efforts made by the School District to find an appropriate placement. We conclude that the trial posed no hardship and the matter was ripe for decision.

III.

The legal guardian of a student not receiving an appropriate education has certain administrative remedies under the EHA. They are designed to afford the complainant maximum due process. *See generally* 20 U.S.C. § 1415. First, the guardian is

4. *See* app. at 30-31, *citing* 20 U.S.C. §§ 1401(19), 1412(4), (5)(C), 34 C.F.R. §§ 300.340-300.346, 300.530-300.534 (1986).

entitled to a due process hearing before the state department of education, the intermediate unit, or the local educational department (i.e.: the School District). 20 U.S.C. § 1415(b)(2). Second, if the hearing is not before the state department of education, the guardian may appeal a decision of a local or intermediate unit directly to that state agency. 20 U.S.C. § 1415(c). Third, if dissatisfied with the agency's decision, whether from an initial hearing or on direct appeal, the guardian may seek relief in a federal or state court. 20 U.S.C. § 1415(e)(2); *see Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert. denied sub nom. Doe v. Sumner Cty. Bd. of Educ.*, ___U.S.___, 110 S. Ct. 730 (1990) (listing the EHA procedural elements required for exhaustion).

The School District contends that Lester failed to exhaust his available administrative remedies. Although this contention has facial appeal, upon examination we agree with the district court's conclusion that exhaustion would have been futile. "[C]ircumstances which require a waiver of the exhaustion requirement raise questions of law. Therefore, [our] standard of review is plenary." *Wilkerson v. Bowen*, 828 F.2d 117, 119 (3d Cir. 1987). Absent futility, the EHA requires a plaintiff to exhaust administrative avenues before seeking relief in the federal or state courts. *See Honig v. Doe*, 484 U.S. 305,___, 108 S. Ct. 592, 606 (1988); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 447 n.5 (3d Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. 1121, 102 S. Ct. 3508 (1982); *Doe*, 879 F.2d at 1343. The basis for the district court's futility finding is that the issues involved here were purely legal, not factual, and that the administrative process was powerless to

address the issue of whether compensatory education was appropriate. We agree.

Courts require exhaustion where the peculiar expertise of an administrative hearing officer is necessary to develop a factual record. *Cox v. Jenkins*, 878 F.2d 414, 419 (D.C. Cir. 1989); *Christopher W. v. Portsmouth School Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989) (*citing McKart v. United States*, 395 U.S. 185, 194-95, 89 S. Ct. 1657, 1662-63 (1969) and *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981)). However, where the factual record is fully-developed and no evidentiary disputes remain, the court can and should decide legal issues. *Christopher W.*, 877 F.2d at 1095, 1099 (no exhaustion required where remaining issues are pure matters of law); *Mrs. W v. Tirozzi*, 832 F.2d 748, 759 (2d Cir. 1987); *Ezratty*, 648 F.2d at 774. The administrative hearing is to receive evidence bearing on whether a particular placement is appropriate or not. Both remaining parties agree that the in-home IEP was inappropriate and supposed to be temporary, and that the School District took approximately 2-1/2 years to locate an appropriate program for Lester H.[5] Stipulations at ¶51, app. at 45; ¶¶51-86, app. at 45-52. Thus, the factual question of injury, usually determined at the administrative level, was conceded in this case because everyone agreed that Lester should not have been at home or at Summit. The only relief the administrative process

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5. The School District admitted that Lester's placement at the Summit School was inappropriate beginning on October 19, 1984. Stipulations at ¶28, app. at 41. He was finally placed at AuClair on January 21, 1987. Stipulations at ¶86, app. at 52.

could have given to Octavia was an IEP stating that Lester should be placed elsewhere. Because everyone already agreed on that point, that clearly was not what Lester needed. What he needed was substantive relief because the school district failed to find an appropriate IEP. The administrative process could not have given that to him; it had no power to grant compensatory education. Therefore, the district court correctly decided that the remedial issue was a pure question of law and that administrative process need not be pursued.[6]

IV.

The district court concluded that the eleventh amendment did not protect the School District from Lester's EHA claims. The School District alleges this to be error. Our review is plenary. *Edelman v. Jordan*, 415 U.S. 651, 677-78, 94 S. Ct. 1347, 1362-63 (1974); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 658 n.1 (3d Cir.), *cert. denied*, — U.S. —, 110 S. Ct. 148 (1989). We believe the district court is correct.

The eleventh amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or

6. Evidently, concomitant to this argument, the School District asserts that when Octavia signed the NORA and consented to each in-home IEP, she waived her right to argue futility and "should not now be heard to argue either that the placements were inappropriate or that they should be granted compensatory education beyond age 21 for a period measured by the duration of the placements which they approved." Appellant's Brief at 23. The argument is totally without merit. All Octavia could contest is that which the School District concedes anyway: the placement was inappropriate. Further, Octavia consented to an in-home placement that was supposed to be temporary.

> equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI.

To determine whether the School District is insulated by eleventh amendment immunity, we must decide whether a Pennsylvania school district is an alter ego of the Commonwealth of Pennsylvania. This depends upon the powers granted the school district by the state. *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977).

In *Mt. Healthy*, the court held that the school district did not share in Ohio's eleventh amendment immunity. Under Ohio law, the term "political subdivision" includes school districts, but the state "does not include political subdivisions." *Mt. Healthy*, 429 U.S. at 280, 97 S. Ct. at 572. Ohio provides its school districts with significant amounts of money. But local school districts retain extensive power to issue bonds and levy taxes subject to certain state restrictions. *Mt. Healthy*, 429 U.S. at 280, 97 S. Ct. at 573. The court concluded that the school district was "more like a county or city than ... like an arm of the state," 429 U.S. at 280-281, 97 S.Ct. at 573, and denied immunity.

This School District's situation under Pennsylvania law is virtually indistinguishable. The term "political subdivision" includes a school district, but the term "commonwealth" does not include political subdivisions. 1 Pa. Cons. Stat. Ann. § 1991 (Purdon Supp. 1990). A school district is an incorporated entity with a statutory right to sue and be sued. 24 Pa. Stat. Ann. §§ 2-211, 2-213 (Purdon 1988). The

Commonwealth does exercise control over educational appropriations, Pa. Stat. Ann. tit. 24, § 25-2501 *et seq.* (Purdon Supp. 1990), and the creation of state agency liaison services called § 25-2501 *et seq.* (Purdon Supp. 1990), and the creation of state agency liaison services called "intermediate units,"[7] Pa. Stat. Ann. tit. 24, § 9-951 (Purdon 1988). But, local school districts are able to issue bonds, Pa. Stat. Ann. tit 24, § 6-632 (Purdon 1988), and collect taxes, Pa. Stat. Ann. tit. 24, § 5-507 (Purdon 1988). When we examine the "nature of the entity created by state law", *Mt. Healthy*, 429 U.S. at 280, 97 S. Ct. at 572, and balance the facts supplied by the record, we conclude that the status of school districts under Pennsylvania law is the same as the status of the Ohio school board in *Mt. Healthy*.

The School District argues additionally that the Commonwealth's control over special education services creates a different situation. *See Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 580 (3d Cir. 1985) (assuming, but not deciding, that a New Jersey school board in its special education capacity acquired eleventh amendment immunity); *but cf. Fitchik*, 873 F.2d at 661 (a school district's lack of immunity is "crystal clear" after *Mt. Healthy*) and *In re Real Est. Title & Settlement Serv. A. Lit.*, 869 F.2d 760, 765 n.3 (3d Cir.), *cert. denied sub nom. Chicago Title Ins. Co. v. Tucson Unified School Dist.*, — U.S. —, 110 S. Ct. 77 (1989). To support this argument, the School District states that the Commonwealth provides a significant amount of funding for

7. We have previously held that intermediate units are "subject to suit as 'local agencies' under the Pennsylvania Political Subdivision Tort Claims Act." *Arnold v. BLaST IU #17*, 843 F.2d 122, 124 (3d Cir. 1988).

special educational services. *See* Pa. Stat. Ann. tit. 24, §§ 13-1373, 1373.1, 1376 (Purdon 1988). This is true, but the School District even in special education remains primarily responsible for providing, administering and maintaining special education services. Pa. Stat. Ann. tit. 24, §§ 13-1372(3), (4), (Purdon 1988).[8] Like the court in *Mt. Healthy*, we conclude that a "significant amount of" state funding does not outweigh the established independent nature of a Pennsylvania school district. 429 U.S. at 280, 97 S. Ct. at 573. We hold, therefore, that the School District does not acquire the Commonwealth's eleventh amendment immunity for special education services.[9]

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8. We note that the Commonwealth's control over special education standards and regulations under Pa. Stat. Ann. tit. 24, §§ 13-1372(1), (2) (Purdon 1988) does not diminish the School District's responsibility for providing these services.

9. By holding that the School District, in its special education capacity, does not share in the Commonwealth's eleventh amendment immunity, we are in accord with other courts of appeals relying on a *Mt. Healthy*-type analysis. *See Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 131-32 (5th Cir. 1986) (inherent local character of Louisiana school boards considered critical); *Fay v. South Colonie Central School Dist.*, 802 F.2d 21, 27 (2d Cir. 1986) (state funding and role as "receptacle" of state education policy do not make school districts alter egos of the state); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 944-946 (7th Cir. 1986) (*per curiam*) (In suit for tuition reimbursement under EHA, local school district defendants not entitled to eleventh amendment immunity or limited purpose immunity); *Travelers Indem. Co v. School Bd. of Dade County*, 666 F.2d 505, 509 (11th Cir.), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77 (1982) (state provision of funds for school construction project did not cloak county school board with eleventh amendment immunity. Damages must come unconditionally out of state treasury). *But cf. Martinez v. Board of Educ. of Taos Municipal School Dist.*, 748 F.2d 1393 (10th Cir. 1984) (State of New Mexico retains broad sweeping control over public education).

V.

The next issue is whether the compensatory education granted by the district court is proper relief. Our inquiry and the scope of review are two-tiered. First, we consider whether Congress empowered the courts to grant a compensatory remedy under 20 U.S.C. § 1412(e)(2). We exercise plenary review over this question. *See School Committee of Burlington v. Department of Educ.*, 471 U.S. 359, 370-71, 105 S. Ct. 1996, 2003 (1985). Second, if the remedy is available, we review to see whether the district court abused its discretion by granting the remedy to Lester. 20 U.S.C. § 1415(e)(2).

An aggrieved party may seek relief in federal court. 20 U.S.C. § 1415(e)(1). The court may award whatever relief "[it] determines is appropriate," 20 U.S.C. § 1415(e)(2), to redress the deprivation of rights under 20 U.S.C. § 1412(2)(B). Section 1412(2)(B) reads:

> (2)....Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –
>
> (B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one not later than September 1, 1980...

20 U.S.C. § 1412(2)(B).

The School District argues that the Court in *Honig, supra* relied upon section 1412(2)(B) to

deny equitable relief to persons over age 21. The *Honig* Court concluded that Doe, age 24, was "no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of three and 21." *Honig*, 108 S. Ct. at 601, *citing* 20 U.S.C. § 1412(2)(B). The Court reasoned that Doe could no longer claim injunctive relief because the Act did not cover him. *Honig*, 108 S. Ct. at 601. In *Board of Educ. of E. Windsor Regional School Dist. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986), we wrote that Section 1412(2)(B) requires a state "to provide a 'free appropriate education' to every disabled child." Thus, under Section 1415(e)(2), a district court is empowered to provide a remedy for individual handicapped children who are deprived of that right.

The crucial difference between *Honig* and Lester's case is the nature of the relief. In *Honig*, Doe was only asking that the Court make the District comply with the Act in the future. But, as an adult (i.e., someone over age 21), Doe had no right to demand that the District comply with the Act either presently or in the future. The Act only gives minors the right to education. Lester, in contrast, is only requesting a remedy to compensate him for rights the district already denied him. He has the right to ask for compensation because the School District violated his statutory rights while he was still entitled to them.

If *Honig* stands for the proposition defendants assert, school districts would be immune from suit if they simply stopped educating intended beneficiaries of the EHA at age 18 or 19. Those beneficiaries' cases would take at least two years to be reviewed, and even if the reviewing courts

found the school districts' behavior egregious, the courts would be powerless to aid the intended beneficiaries because those beneficiaries would now be over age 21. We cannot believe that either Congress or the Supreme Court meant to allow a school district to withhold a disabled minor's educational rights at age 18 or 19 without remedy.

Neither is the form of remedy, compensatory education, foreclosed by *Honig*. Relief designed to cure deprivations under 20 U.S.C. § 1412(2)(B) must accord with congressional intent. *See Burlington*, 471 U.S. at 370-371, 105 S. Ct. at 2003. In *Burlington*, the Supreme Court held that tuition reimbursement constitutes appropriate relief under the EHA because it "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-371, 105 S. Ct. at 2003. Furthermore, tuition reimbursement addresses "[a] child's right to a *free* appropriate public education," and satisfies the congressional intent to provide relief which remedies the deprivation of that right. *Burlington*, 471 U.S. at 370, 105 S. Ct. at 2003. (emphasis in original).

Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986) extended this rationale to compensatory education, adding that the School District "should [not] escape liability for [educational] services simply because [the parent] was unable to provide them in the first instance. ... We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs." *Miener*, 800 F.2d at 753. The *Miener* court reasoned that compensatory education, like tuition reimbursement, cures the deprivation of a handicapped child's statutory

rights, thus providing a remedy which Congress intended to make available. 800 F.2d at 753; *accord Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated and remanded on other grounds sub nom. Sobol v. Burr*, – U.S. –, 109 S. Ct. 3209 (1989), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, – U.S. –, 110 S. Ct. 1298 (1990) ("We do not believe that Congress intended to provide a right without a remedy"); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (both remedies necessary "to preserve a handicapped child's right to a free education.") *Miener* also noted that compensatory education satisfies Congress' intent to channel available resources to programs benefitting the handicapped. 800 F.2d at 753, *citing Smith v. Robinson*, 468 U.S. 992, 1020, 104 S. Ct. 3457, 3474,[10] *quoting* 121 Cong.Rec. 19501 (1975).[11]

We conclude that Congress empowered the courts to grant a compensatory remedy.

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10. The 1986 statutory amendment of the EHA superseded *Smith* by allowing protected beneficiaries to pursue federal statutory rights and remedies outside the EHA. H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796 (1986), but it supports the congressional language quoted in *Smith*.

11. *Alexopulos v. Riles*, 784 F.2d 1408, 1412-13 (9th Cir. 1986) is distinguishable. *Alexopulos* characterized his complaint as one for equitable injunctive relief. Thus, unlike Lester, he was not just asking for compensation. Alternatively, we would reject the rationale of *Alexopulos* which ignores the principle that the remedy may exceed the scope of the right in order to cure the statutory violation. *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated and remanded on other grounds sub nom. Sobol v. Burr*, – U.S. –, 109 S. Ct. 3209 (1989), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, – U.S. –, 110 S. Ct. 1298 (1990).

Furthermore, we conclude that Congress, by allowing the courts to fashion an appropriate remedy to cure the deprivation of a child's right to a free appropriate public education, did not intend to offer a remedy only to those parents able to afford an alternative private education. The only question remaining then is whether the court abused its discretion by granting 30 months of compensatory education to Lester beyond age 21. We conclude that it did not.

The School District had no reason to delay a proper placement for Lester. It knew before he entered the school system that it could not provide an appropriate educational program for him. Stipulations at ¶13, app. at 37. The court found that the District "should have known or could have ascertained from the approved schools list that there were at least six Pennsylvania schools" suitable for Lester, and that it could have "applied promptly" to each of them. App. at 10. Furthermore, the district court specifically found that the School District "should have known the identity of AuClair and other out-of-state schools or should have ascertained their identity" before it did, and that Lester was harmed by their failure to do so. App. at 13. For sixteen months the School District failed to apply on Lester's behalf for admission to any school, and during the thirty months of inappropriate placement, Lester regressed. Because of this, we hold that the district court did not abuse its discretion when it fashioned this remedy for Lester.[12] The court's award merely compensates Lester for what

12. We express no opinion whether the time a school district spends in a good faith effort to place a handicapped student into an appropriate program should or must always be included within the period for which compensatory education is awarded.

everyone agrees was an inappropriate placement from 1984 through January, 1987 and belatedly allows him to receive the remainder of his free and appropriate public education.

VI.

CONCLUSION

We conclude that, under the EHA, Lester is entitled to the 30 months of compensatory education provided by the district court, that this issue is ripe for decision and that Lester did not need to exhaust the EHA's administrative remedies. Finally, we hold that a Pennsylvania school district, even in its special education capacity, does not acquire the Commonwealth's eleventh amendment immunity. The district court's order of November 9, 1989 will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DATED NOVEMBER 9, 1989 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 86-6852

LESTER H., A Minor who sues by his mother and next friend, OCTAVIA P. and OCTAVIA P., on her own behalf,

v.

DONALD M. CARROLL, JR.,[1] Secretary of Education, Commonwealth of Pennsylvania, and the CHESTER UPLAND SCHOOL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NORMA L. SHAPIRO, J. NOVEMBER 9, 1989

Minor plaintiff Lester H. ("Lester H.") is an eleven year old, severely retarded child who is a resident of the Chester Upland School District (the "District"). Lester's mother, Octavia P. ("Octavia P."), sues on behalf of herself and Lester H. They seek declaratory and injunctive relief against the District and the Commonwealth of Pennsylvania for violation of the Education

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1. Donald M. Carroll, Jr. has replaced Thomas K. Gilhool as Secretary of Education. Under Fed.R.Civ.P. 25(d)(1), Mr. Carroll automatically replaces Mr. Gilhool as the named defendant in this action.

of the Handicapped Act, as amended, 20 U.S.C. §§ 1400 *et seq.* ("EHA" or the "Act"). A non-jury trial was held on March 30, 31 and April 20, 1988 but decision was deferred pending the recent Supreme Court decision in *Dellmuth v. Muth*, ____ U.S. ____, 109 S. Ct. 2397, 105 L.Ed. 2d 181 (1989). Following reargument, judgment will now be entered for plaintiffs in accordance with the following Findings of Fact and Conclusions of Law required by Fed.R.Civ.P. 52.

Facts

Defendants are Donald M. Carroll, Jr., the Secretary of Education of the Commonwealth of Pennsylvania (the "Secretary"), in his official capacity, and the District. The Secretary and the District receive federal financial assistance under the EHA and are required to comply with its mandates; if private education is necessary to comply with the Act, the Pennsylvania Department of Education ("PDE") must reimburse the District for 80% of its cost. This contribution is mandated by state statute. Act of March 10, 1949, P.L. 30, § 1376, as amended; 24 P.S. § 13-1376.

In May, 1983, as Lester H. was approaching school age, the District received and reviewed information necessary to provide a special education program to meet his needs. Russell W. Johnson ("Johnson"), Director of Special Education, was responsible for making recommendations regarding Lester H.'s educational needs, placing Lester H. and monitoring his progress.

Prior to the beginning of the 1983-84 school year, the District determined that it could not provide an appropriate education program for Lester H.; the District requested the assistance of the Delaware County Intermediate Unit ("the Intermediate Unit")

in locating an appropriate program.

In the fall of 1983, Lester H. entered Summit School, a publicly-operated day education program for handicapped children. This placement was initially successful; however, upon Lester H.'s return to Summit School for the 1984-85 school year, school officials reported to Johnson that Lester H.'s behavior had deteriorated significantly and that he required constant individual attention.

In October, 1984, Johnson, Summit staff, and Lester H.'s mother agreed that Lester H. could not be educated appropriately at Summit, and that a residential special education program was required. This determination was supported by Mary Carol Homyak, a psychologist, and Dr. Enrique Martin del Campo, a psychiatrist, both of whom evaluated Lester H. at the District's request.

In Pennsylvania, residential special education programs are generally provided by private schools. The PDE maintains a list of approved Pennsylvania private schools for the use of local school districts. If there is no appropriate in-state program for a handicapped child, a school district must utilize an appropriate out-of-state program. PDE approves the placement of a handicapped student in an out-of-state facility only if the child has been rejected by all appropriate approved in-state schools.

There were six Pennsylvania schools on the approved schools list with residential programs for elementary level students with severe mental retardation and behavioral problems: Woods School; Gertrude Barber Center; Camp Hill Special Schools; Melmark School, Devereux School and Davidson School of the Elwyn Institutes. With an extensive background in working with disabled

children, and 17 years of experience as Director of Special Education for the District, Johnson should have known or could have ascertained from the approved schools list that there were at least six Pennsylvania schools for Lester H.'s placement. Johnson could have applied promptly to each of these six Pennsylvania schools.

In November and December, 1984, Johnson applied to two schools with residential programs.[2] One school rejected Lester H. immediately. The other school rejected him in February, 1985. During the remainder of the 1984-1985 school year, Johnson did not apply to any other approved school in Pennsylvania or any out-of-state school. During that school year, Lester H. continued to regress and was removed from Summit in August, 1985.

In September, 1985, the District developed an Individualized Education Program ("IEP") for Lester H.'s instruction at home. The IEP stated that the reason for his assignment to homebound instruction was that he was "[a]waiting residential placement," and that the homebound services were expected to last "[u]ntil placement occurs." Although Octavia P. signed a form agreeing to homebound instruction for Lester H., her signature was not an acknowledgment that such a program was appropriate for Lester H. Octavia P. signed the form because Summit refused to accept Lester H.; the in-home program was all that the District would then provide, and the District assured her this was a temporary placement pending the residential placement the District was seeking.

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2. One of these, the Don Guanella School, is not on the list of approved private schools in Pennsylvania. Although a private facility, its education program is provided by an Intermediate Unit.

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Lester H. was provided with five hours per week of instruction at home. Lester H.'s family considered moving to Washington, D.C. in October, 1985, but returned to the Philadelphia area after only a brief absence and Lester H.'s homebound instruction continued. Lester H. received only this limited homebound instruction from September, 1985 until January, 1987, when Lester H. was finally placed in a residential program.

From December, 1984, when Lester H. was referred to Elwyn Institutes, until April, 1986, a period of 16 months, the District did not refer Lester H. to any approved school in Pennsylvania, any other Pennsylvania facility, or any out-of-state school. During that period the County Mental Health/Mental Retardation office ("MH/MR") did attempt to place Lester H. However, at no time did Johnson receive assurance from MH/MR that it could appropriately place Lester H. In September, 1985, Johnson received from that office a memorandum denying the possibility of placement for Lester H. through the MH/MR system. Octavia P. had a limited income and could not afford to pay for Lester H.'s residential placement during the extended period the District failed to provide one.

In April, 1986, Johnson referred Lester H. to Devereux Foundation and Wordsworth Academy, schools on the approved schools list, but Lester H. was rejected by both schools that same month. In late April, 1986, counsel for Lester H. spoke with Dr. Ohrtman, Chief, Division of Special Projects for PDE, and asked for assistance in placement. On April 25, 1986, the District reapplied to Elwyn at the suggestion of PDE and the Education Law Center, Inc. Lester H. was admitted to Elwyn's 1986 summer program as a day student.

In mid-August, 1986, Elwyn notified the District that Lester

H. had not benefited from the summer program and that Elwyn could not provide an appropriate program in the Fall. After attending the Elwyn program for 34 days, Lester H. was returned to five hours per week in-home instruction.

In August and September, 1986, Johnson applied to four additional approved schools on Lester H.'s behalf: Martin Luther School, Timothy School, Gertrude Barber Center, and Camp Hill Special Schools, and he reapplied to Devereux Foundation. Timothy School was a day program without a residential special education program. Most of these schools rejected Lester H. within a month of application.

On September 22, 1986, Lester H.'s counsel wrote to Dr. Gary J. Makuch, Chief, Bureau of Special Education of PDE, that Lester H. had been without an appropriate special education program for more than a full school year, and asked that Lester H.'s situation be rectified. PDE responded by offering technical assistance to the District and requiring the District to provide PDE with a status report on or before October 30, 1986.

On October 14, 1986, at the suggestion of a PDE official, Johnson applied to AuClair School in Bear, Delaware. AuClair accepted Lester H. by letter to Johnson dated December 19, 1986; Lester H. has attended AuClair since January 21, 1987. Johnson should have known the identity of AuClair and other out-of-state schools or should have ascertained their identity from PDE officials, or other sources, prior to the fall of 1986.

Lester H. is now doing well. Johnson has visited Lester H. and reports that his behavior has improved; his attention span has lengthened and he is making progress in self-help and communication skills. Lester H.'s education at AuClair includes programs in socialization, communication, language and language concepts, independent living, math, reading, pre-vocational skills,

leisure, fine motor activities and self-care skills. AuClair has developed and implemented an extensive behavior management program for Lester H. that focuses on key behavioral problems and uses a reinforcement system to help Lester H. develop appropriate behavior. The results are recorded and charted periodically to ascertain progress. Lester H. is making satisfactory progress in acquiring skills, developing positive behavior, and reducing interfering behavior. His current placement meets Lester H.'s needs and he would not benefit from additional services at this time.

Although Lester H. is now benefiting from his educational program, the delay in placing him harmed his development. Lester H., like other seriously disabled youngsters, learns very slowly and by rote. He cannot generalize skills and must learn each skill and how to apply it. Lester H. also must "unlearn" negative behaviors that have been acquired and/or reinforced, and this is also a slow process. Because Lester H. learns by frequent repetition of the same task or skill, the amount of time Lester H. spends in an appropriate education program is clearly related to how much Lester H. will learn. The 2-1/2 year loss of appropriate educational programming has reduced the amount that Lester H. can learn by the time he is 21.

Although all disabled persons can learn, the rate of learning slows as the person grows older. The amount of educational progress that Lester H. can be expected to make in a 2-1/2 year period is less now than it was from September, 1984 to January, 1987. However, Lester H. can still learn and will be able to continue to benefit from education all of his life. At some time before or after age 21, Lester H.'s education program will more likely than not focus on vocational skills and on refining those behavioral and survival skills needed to live in a supervised

community setting and to participate in a pre-vocational or vocational program.

Lester H.'s ability to live in a supervised community setting and perform activities that will give him a sense of self-esteem as an adult will depend on the extent to which he has acquired basic skills and has been able to curb his aggressive and self-abusive behavior. Lester H. was denied the opportunity to gain crucial skills for the 2-1/2 years that he did not receive an appropriate education. Lester H. may need additional years of instruction beyond 21 to be able to achieve basic goals and live with a measure of dignity and independence.

DISCUSSION

Plaintiffs seek a declaratory judgment that defendants must continue to provide appropriate special education services to Lester H. for 2-1/2 years after he reaches 21 years of age to compensate for the period during which he was denied appropriate services. It is uncontested that the program provided to Lester H. from September, 1984 through January, 1987 was not appropriate; it is also uncontested that a residential educational program was required. There is also no dispute that Lester H.'s placement at the AuClair School is currently appropriate.

The ultimate issue to be decided is the remedy, if any, to which Lester H. is entitled for his 2-1/2-year deprivation of appropriate education. This is determined by: 1) whether compensatory relief is appropriate under EHA; 2) if it is appropriate, whether EHA authorizes such relief after the age of 21 when it was not possible earlier; 3) whether the eleventh amendment relieves the District or Commonwealth of liability; 4) whether exhaustion of administrative remedies is required; and

5) whether plaintiffs' claim for compensatory education beyond the age of 21 is ripe for determination.

A. Appropriate Relief Under EHA

Defendants argue that because Lester H. is now receiving a free appropriate education, plaintiffs state no claim under EHA. While defendants admit that parents may be reimbursed for expenses incurred for services refused by education officials, defendants contend that reimbursement is not warranted because the District and State made efforts to comply with EHA and Lester H.'s family incurred no educational expenses subject to reimbursement.

The EHA mandates a free appropriate education for all handicapped students in states receiving funds under that Act.[3] The Act guarantees procedural safeguards to protect the interest of the child in receiving an appropriate education and to allow the parents to participate in developing the child's program. The EHA also grants parties "aggrieved by the findings and decision

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3. Title 20 U.S.C. § 1412(2)(B) states:

> a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State.

made" in EHA administrative proceedings access to the district court for "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

In *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985), the father of a handicapped child placed him in private school at his own expense pending determination of an ultimately successful challenge to the proposed educational plan. The issue was whether EHA § 1415(e)(2) permits courts to order tuition reimbursement as a retroactive remedy. The Supreme Court, considering it beyond doubt that "appropriate" relief would include a prospective injunction ordering educational services where the IEP was inadequate, found that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." *Burlington,* 471 U.S. at 370. The Court recognized that the authorization of "appropriate" relief confers broad discretion on the court:

> The statute directs the court 'to grant such relief as [it] determines is appropriate.' The ordinary meaning of those words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate in light of the purpose of the Act."
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> *Burlington,* 471 U.S. at 369.

In *Miener v. State of Missouri,* 800 F.2d 749 (8th Cir. 1986), the court considered the impact of *Burlington* on EHA claims for compensatory services. Plaintiff, fourteen year old Terri

Miener, needed special education services following brain surgery. Although the district acknowledged this need, it did not provide it. Her father, financially unable to pay for private schooling, admitted her to a mental health facility. The family brought an action in district court seeking, *inter alia,* three years of compensatory education services.

The court refused to distinguish compensatory services from the retroactive reimbursement awarded in *Burlington*; it held that compensatory education would be appropriate relief under EHA § 1415(e)(2) if Terri succeeded on remand in establishing that she had not been provided a free appropriate public education. *Miener,* 800 F.2d at 754 n.3.

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with *Burlington* nor with congressional intent. Like the retroactive reimbursement in *Burlington,* imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along," 105 S.Ct. at 2003. Here, as in *Burlington,* recovery is necessary to secure the child's right to a free appropriate public education. *Id.* We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to "front" its costs . . . .
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> . . . Indeed, this case may present an even more compelling claim for relief than did *Burlington,*

since in *Burlington* the child had already received educational services without resort to the governmental resources devoted to that purpose, resources whose effectiveness Congress desired to promote through safeguarding them against damages claims.

Miener, 800 F.2d at 753, 754.

See also Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857-58 (11th Cir. 1988) (finding that "[c]ompensatory education, like retroactive reimbursement, is necessary to preserve a handicapped child's right to a free appropriate education"); *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated sub nom, Sobel v. Burr*, ____ U.S. ____, 109 S. Ct. 3209, 106 L.Ed. 2d 560 (1989), *reaffirmed*, No. 88-7275 (2d.Cir. Oct. 27, 1989).

In *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988), *rev'd* as to Commonwealth only, *Dellmuth v. Muth*, ____ U.S. ____, 109 S. Ct. 2397, 105 L.Ed. 2d 181 (1989) (EHA does not abrogate the state's eleventh amendment immunity from suit), the Court of Appeals affirmed a reimbursement award where minor plaintiff had been deprived of a free appropriate education during the pendency of administrative proceedings concerning his IEP. EHA relief is flexible and should be determined by the equities of the case. *Muth*, 839 F.2d at 126.

The Court of Appeals for the Third Circuit has not yet considered compensatory education under EHA but the reasoning of *Muth* and *Miener* is compelling. Lester H.'s family could not advance money to finance private education during the 2-1/2 year period he was awaiting placement but, like *Muth* and *Miener*, he should be compensated for his deprivation. The damage caused to Lester H. from improper placement during years recognized by the Supreme Court as "critical to the child's development," *Burlington*, 471 U.S. at 361, may never be fully redressed. We should not penalize him further because his mother was unable

to provide for his private education while responsible authorities ignored the law.

The equities of this case weigh strongly in favor of awarding compensatory education to Lester H.[4] After concluding that residential placement was needed, the defendant District took an unreasonably long time to find an appropriate educational program for Lester H. Only after Lester H.'s counsel complained to PDE did the District make vigorous efforts to locate an out-of-state placement with the assistance of PDE.

B. Compensatory Education After 21

Defendants claim that compensatory education is unauthorized by EHA and the Act's language limiting EHA eligibility to children between the ages of 3 and 21 bars compensatory education after age 21. 20 U.S.C. § 1412(2)(B). However, § 1415(2)(e) permits district courts to grant "appropriate" relief. This statutory authorization allows the court to consider relief based on the equities of the case, "in light of the purpose of the Act." *Burlington*, 471 U.S. at 369. The major purpose of the Act is to insure that every disabled student receives

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4. The Commonwealth was less at fault than the District because it knew of the non-compliance with the EHA in Lester H.'s case or a shorter period of time. However, there was evidence that PDE was on notice, from at least April, 1986, that Lester H. was being denied an appropriate education; PDE should have taken action to remedy the situation at that time. Although the District and Commonwealth were both remiss in meeting their responsibilities, we doubt whether the parties' conduct is relevant. If the parents have been unable to finance appropriate education, compensatory services should be provided regardless of "fault" so that in accordance with *Burlington*, "the child's right to a free appropriate education [is nothing] less than complete." *Burlington*, 471 U.S. at 370.

a free appropriate special education for a certain number of years.

In *Burr v. Ambach,* 863 F.2d 1071 (2d Cir. 1988), the Second Circuit upheld an award of compensatory education past the age of 21. Clifford Burr, a handicapped student, had been appropriately placed in a private school for the blind. When his school closed, Clifford was denied admission to a state-supported school and remained without an appropriate placement pending administrative review of this denial. The court reversed an administrative finding that EHA does not authorize an award of compensatory education beyond the age of 21:

> [W]e believe that Clifford is entitled to a remedy for deprivation of the right that the statute clearly provided him—a free appropriate education between the ages of three and twenty-one, 20 U.S.C. § 1412(2)(B). Section 1415 of the EHA authorizes a district court to award "such relief as the court determines is appropriate." In some circumstances, the scope of the remedy can extend beyond the scope of the original right.
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> *Burr,* 863 F.2d at 1078.

See also Jefferson County Bd. of Educ., 853 F.2d at 857-58 (ordering compensatory education past age 21); *Max M. v. Thompson,* 592 F. Supp. 1450, 1457-58 (N.D. Ill. 1984) (same); *Campbell v. Talladega County Bd. v. Educ.,* 518 F. Supp. 47, 56 (N.D. Ala. 1981) (same).

Defendants argue that *Honig v. Doe,* ____ U.S. ____, 109 S. Ct. 592, 98 L.Ed. 2d 686 (1988), holds there is no statutory authority for requiring special education of Lester H. beyond age

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21. Doe and Smith, emotionally disturbed students, were suspended from school for disruptive behavior pending the conclusion of expulsion proceedings by the school district. Doe's suit, in which Smith intervened, sought injunctive relief. The district court had permanently enjoined the school district from suspending these disabled students for more than five days and from changing placement without parental consent while the contested EHA hearing was pending. However, the Supreme Court decided the controversy was moot as to Doe who at 24 was "no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of three and 21." *Honig*, ____ U.S. at ____ , 109 S. Ct. at 601, 98 L.Ed. 2d at 703. But the controversy was still justiciable as to Smith who was just under 21 when the case reached the Court. The Court held that schools have only limited powers to suspend students under EHA.

Honig does not preclude an award of compensatory education beyond the age of 21 for denial of an appropriate education before 21. The issue in *Honig* was denial of education pending EHA procedural due process; Doe or Smith did not suffer significant deprivation of an appropriate placement since the district court had directed Doe's return to school and provided Smith with in-home instruction to which his parents agreed. But Smith, being under 21, might have chosen to return to school and been subjected to suspension again. The power to suspend and length of suspension were the issues in *Honig*, not compensatory education to rectify educational deprivation. *Honig* does not bar relief after age 21, as long as plaintiff is under 21 when the violation occurs. Liability terminates at 21 but if there is liability, an award of damages is not so limited.

The Act's purposes are furthered by awarding compensatory

services to one denied appropriate services altogether for 2-1/2 years. The fact that a student is entitled to an education from age 3 through 21 does not preclude the student's compensatory award for 2-1/2 years of deprivation by extension of his legal entitlement after the age of 21. Such an extension is particularly appropriate here where additional services before 21 would be of no help to Lester H. because his current program meets all his needs. Lester H. is entitled to receive "belatedly" the same number of years of appropriate education that he "should have received all along." *Burlington*, 471 U.S. at 370, 371.

C. Eleventh Amendment Immunity

Both the Commonwealth and the District argue that an award of compensatory services is barred by the Eleventh Amendment.

The Supreme Court recently held that Congress did not abrogate states' immunity under the Eleventh Amendment when it passed EHA; a state cannot be required to pay retroactive damage awards in EHA cases. *Dellmuth v. Muth*, ____ U.S. ____, 109 S. Ct. 2397, 105 L.Ed. 2d 181 (1989). However, the *Dellmuth* Court did not decide whether the relief sought by the plaintiffs here—a prospective declaration that defendants must provide Lester H. with compensatory educational services—is an award of retroactive damages to plaintiff, proscribed by *Muth*, or an award of prospective injunctive relief, valid even though it may require expenditure of funds on behalf of plaintiff.

In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Supreme Court held an injunction ordering remedial educational programs to remedy past constitutional violations did not violate the Eleventh Amendment. State officials had participated in maintaining Detroit's unconstitutionally segregated public school system. The

lower courts ordered the state defendants to fund 50% of the cost of a future remedial education program for black pupils who had been educated in segregated schools. The Court stated:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U.S. at 667, 94 S.Ct. at 1357. The order challenged here does no more than that . . . . The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit . . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.
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> Id. at 289-90 (emphasis in original; footnotes omitted).

In *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 479 U.S. 962 (1986), state appellants argued that relief ordered by the district court required the expenditure of state funds in

violation of the Eleventh Amendment. The appellee, unconstitutionally confined for thirty years in an institution for retarded persons, had not acquired the skills needed for community living; the district court ordered her placement in a community living arrangement at state expense. The Court of Appeals upheld the order:

> Given the square holding in *Milliken II* that a federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of past constitutional violations, we hold that the Commonwealth defendants' Eleventh Amendment argument is meritless.
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> *Clark*, 794 F.2d at 84.

Other courts have considered whether an award of compensatory education under EHA is barred by the Eleventh Amendment. In *Burr v. Ambach*, 863 F.2d at 1079, the Court of Appeals for the Second Circuit affirmed an EHA award of 1-1/2 years of compensatory education to remedy past deprivation of a free appropriate education in violation of EHA:

> [W]e believe that the mandatory injunction awarded Clifford in this case is purely prospective in nature, and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment. See *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed. 2d 662 (1974).
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> *Burr*, 863 F.2d at 1079.

See also Timms v. Metropolitan School District, 722 F.2d 1310, 1315-16 (7th Cir. 1983) (dicta implying that compensatory education not barred); *Max M. v. Thompson*, 535 F. Supp. 317, 324-25 (N.D. Ill. 1984) (holding Eleventh Amendment does not bar award of compensatory education based on *Timms* dicta). But see *Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); *Alexopulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir. 1986).

Lester H. was harmed by the denial of essential services at a vulnerable age. As in *Clark* and *Milliken*, Lester H. seeks relief that operates prospectively to correct past unlawful deprivation. Therefore, we hold that the Eleventh Amendment does not bar the award of compensatory education under EHA.

Although we hold that compensatory education is prospective relief, the award need not rely on that ground alone. Plaintiffs asserted not only a claim under EHA but also a cause of action under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations. *See* Complaint ¶¶44-46. Under the 1986 Amendments to the Rehabilitation Act, "[a] State shall not be immune under the Eleventh Amendment . . . from suit in federal court for a violation of section 794 of title 29" that "occur[s] in whole or in part after October 21, 1986." 42 U.S.C. § 2000d-7. This provision meets the Supreme Court's requirement that Congress make its intention to abrogate immunity "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Because this action was filed on November 24, 1986 and Lester H. did not attend AuClair until January 21, 1987, violations occurred after October 21, 1986. The Commonwealth therefore has no Eleventh Amendment immunity from the plaintiffs' Rehabilitation Act claim.

Furthermore, the relief available to plaintiffs under EHA is

also available under the Rehabilitation Act. Congress amended the EHA in 1986 to allow plaintiffs to bring claims under both EHA and the Rehabilitation Act 20 U.S.C § 1415(f). *See also Mrs. W. v. Tirozzi*, 832 F.2d 748, 751 (2d Cir. 1987) ("§ 504 of the Rehabilitation Act . . . may be used as [a] remed[y] to enforce EHA educational rights"). Regulations promulgated pursuant to § 504 of the Rehabilitation Act provide, in language similar to EHA, that recipients of federal funds must provide "a free appropriate public education to each qualified handicapped person," 34 C.F.R. § 104.33(a) (1988). "Qualified handicapped person" is defined *inter alia* as a handicapped person "to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act [20 U.S.C. § 1412]." 34 C.F.R. § 104.3(k)(2)(iii) (1988).

Even if an award of compensatory education for Lester H. against the Commonwealth were barred by the Eleventh Amendment, the District would be liable; the District has no claim to Eleventh Amendment immunity. "[L]ocal governmental units are not considered part of the state for Eleventh Amendment purposes." *Quern v. Jordan*, 440 U.S. 342, 349 (1979). *See School Committee of Burlington v. Department of Educ.*, 471 U.S. 359 (1985) (requiring the school district to reimburse plaintiffs for private school tuition expended by plaintiffs); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Miener*, 800 F.2d at 752.

D. Waiver and Exhaustion

The District asserts that Lester H.'s mother waived the right to object to homebound instruction when she "approved" Lester H.'s homebound program in August, 1985 and failed to challenge that placement administratively.

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Lester H. began the 1984-85 school year at the Summit school, a facility operated by the local Intermediate Unit. By October, 1984, the District had concluded that Lester H. was inappropriately placed at Summit and that he needed a residential education program. Octavia P. agreed with this conclusion. However, Lester H. was not offered another program or placement; he remained at Summit for the remainder of that school year but deteriorated steadily.

In August, 1985, Lester H. was disenrolled from the Summit school and Octavia P. approved the only educational program the District then offered—five hours per week of in-home instruction. The IEP developed by the District for that in-home program stated that this assignment was being offered because Lester H. was awaiting a residential placement and that the in-home program would last only until such placement could be arranged.

Beginning in the fall of 1984, Octavia P. contacted Johnson and urged him to locate a residential special education program for Lester H. There is no dispute among the parties that Lester H.'s 1984-85 Summit School program and his 1985-86 and 1986-January, 1987 in-home programs were inappropriate and did not meet his needs. Even if Octavia P. had the power to "waive" Lester H.'s right to seek compensatory services, clearly no waiver took place in this case. She agreed to in-home instruction pending residential placement when the District assured her it would be temporary. Administrative or judicial review of the interim placement was not required where the District conceded it was inappropriate and promised it was only temporary. Experienced public officials vested with statutory responsibility for the education of the handicapped cannot use the trust, ignorance or helplessness of those in their charge as an excuse

for inaction.

The District also contends that Lester H.'s claim for compensatory education must first be pursued through an administrative appeal. It is unnecessary to exhaust administrative remedies where doing so would be futile. *See Tocarcik v. Forest Hills School District*, 665 F.2d 443, 447 n. 5 (3d Cir. 1981), *cert. denied sub nom, Scanlon v. Tocalcik*, 458 U.S. 1121 (1982).

Not only did plaintiffs request appropriate education, but the inappropriateness of the placement was not contested; the school district failed to implement its own formal recommendation for residential placement. Under these circumstances, pursuing an administrative complaint before judicial review was not a necessary prerequisite to recovery under EHA.

It would be futile for the court to require plaintiffs to resort to the administrative system of PDE when the plaintiffs and PDE agree on the facts and disagree only on their legal consequences. The legal issues to be determined by the court are not those requiring peculiar administrative expertise. Plaintiffs are not required to exhaust the PDE administrative process when PDE administrators would take the PDE position that both reimbursement and compensatory education are unavailable to Lester H.

E. Justiciability

This case is ripe and otherwise justiciable where "the essential facts establishing a right to relief, including declaratory relief, have already occurred, the case is justiciable." *Riehl v. Travelers Ins. Co.*, 772 F.2d 19 (3d Cir. 1985), citing *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). All events relevant to

whether the violation of Lester H.'s rights entitle him to compensatory education services have already occurred; nothing would be gained by delaying adjudication until some future time. The fact that we do not yet know the exact nature of Lester H.'s educational needs at age 21 does not render this a case where the court is asked to decide issues based on events that have not yet occurred.

Plaintiffs do not request the court to determine the form or components of the instructional program Lester H. will need when he is 21 years of age (*i.e.*, to determine whether he will still need a residential special education program or what he will need to learn at that date). The Act sets out a detailed procedure for determining, on an annual basis, the type of education program that is appropriate for a disabled child. It requires that the student be evaluated by a variety of professionals, that the professionals meet to analyze the evaluation data, that the results of this multi-disciplinary team review be shared with the parent, and that the parent and school officials meet collaboratively to develop an Individualized Education Program for the child. 20 U.S.C. §§ 1401(19), 1412(4)(5)(C), 34 C.F.R. §§ 300.340-300.346, 300.530-300.534 (1986). Should disputes arise, EHA provides an extensive system of administrative and judicial review. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500-300.512 (1986). This court decides now only that Lester H. is entitled to 2-1/2 years of some sort of program under EHA beyond the age of 21 to compensate for that period of deprivation of his entitlement before the age of 21 if he can then benefit therefrom. The nature of the program will be determined by the procedures provided for under the EHA.

Finally, the District contends that because Lester H. has now been placed in an appropriate educational program there is no present controversy sufficient to confer jurisdiction. However,

there is a clear controversy over his entitlement to compensatory relief for that period when he admittedly had no appropriate educational placement.

CONCLUSION

Compensatory education is appropriate relief under EHA. There is no bar to such recovery against either defendant imposed by the Eleventh Amendment; plaintiffs have not waived their right to compensatory services; they are not required to exhaust administrative procedures and the controversy is presently justiciable. Therefore, the court will declare that Lester H. is entitled to a free appropriate education for 2-1/2 years beyond the age of 21 subject to the procedural protections provided for by the EHA.

An appropriate Order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 86-6852

LESTER H., a Minor who sues by his mother and next friend, OCTAVIA P. and OCTAVIA P., on her own behalf,

v.

THOMAS K. GILHOOL, Secretary of Education Commonwealth of Pennsylvania, and the CHESTER UPLAND SCHOOL DISTRICT.

JUDGMENT ORDER

AND NOW, this 9th day of November, 1989, in accordance with the court's Findings of Fact and Conclusions of Law in a Memorandum of this date, it is ORDERED that DECLARATORY JUDGMENT is entered for plaintiffs as follows: Lester H is entitled to a free appropriate education for 2-1/2 years beyond the age of 21; the form and manner of his education is subject to annual determination in accordance with the procedures under the Education of the Handicapped Act, as amended, 20 U.S.C. §§ 1400 *et seq.*